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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1335

PHILIP J. ANSELMO, JR. and TERRANCE C. LEE,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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Philip J. Anselmo and Terrance C. Lee, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana which upon application of the State of Louisiana granted writs under its supervisory jurisdiction to review an order of the Criminal District Court for the Parish of Orleans sustaining a Motion to Suppress Evidence seized by virtue of a search warrant. The Supreme Court of Louisiana reversed the trial court and denied the Motion to Suppress Evidence.

OPINIONS BELOW

The Criminal District Court for the Parish of Orleans did not render written reasons for his order suppressing evidence. However, the Court did orally ren-

der reasons from the bench. (Appendix A). The Supreme Court of Louisiana rendered written reasons for its judgment on December 13, 1971. (Appendix B). An application for rehearing was filed with the Supreme Court of Louisiana by petitioners and was refused on January 17, 1972.

JURISDICTION

The final judgment of the Louisiana Supreme Court was entered on January 17, 1972. The jurisdiction of this Court is conferred by 28 USC. 1257.

QUESTIONS PRESENTED

Whether a search and seizure of evidence, upon a search warrant, is violative of the Fourth Amendment of the United States Constitution where the allegations and averments contained in the police officer's affidavit supporting the application for the warrant are based upon proven false and fictitious statements to said officer by an undisclosed confidential informer, as well as upon statements of said officer-affiant proven to be false.

The Louisiana Supreme Court states that "the issue presented is whether the truthfulness of the facts set out in an affidavit supporting a search warrant may later be attacked at a hearing in a Motion to Suppress."

STATEMENT OF THE CASE

On March 29, 1971, a search warrant was signed by Judge Bernard J. Bagert, Sr., Criminal District Court

for the Parish of Orleans, permitting the search of an apartment. The application for the warrant was upon an affidavit of a City of New Orleans Police Officer, and probable cause shown was based upon false and fictitious information of an undisclosed confidential informer. A search of the apartment was made and marijuana and LSD were found in the apartment. On March 29, 1971, the District Attorney for the Parish of Orleans filed two bills of information charging Anselmo and Lee with (1) possession of LSD, Case No. 220-923, and (2) possession of LSD, Case No. 220-924. Motions to Suppress the Evidence were filed in both cases and consolidated for hearing before Judge Matthew Braniff, Criminal District Court, Parish of Orleans.

The Court heard testimony, over objection of the State of Louisiana, controverting the statements of a confidential informer and the police officer as set out in the affidavit presented to the Judge by the police officer in his application for the warrant. The lower court sustained the Motion to Suppress the Evidence. The State of Louisiana reserved a bill of exception and sought writs from the Louisiana Supreme Court, which were granted. The Louisiana Supreme Court, in a case of first impression, reversed and denied the Motion to Suppress the Evidence.

The police officer-affiant testified that he received an anonymous phone call alleging that Anselmo and Lee were in possession of drugs. Three days later, a confidential informer not named in the affidavit, allegedly reliable, because he had furnished information

resulting in arrests and convictions in numerous narcotics cases, also not identified in the affidavit, told the affiant that he had been invited to a pot party in the French Quarter apartment of Anselmo and Lee. The officer-affiant "strip searched" the informer and sent him into a building of several apartments. The police officer admitted that he couldn't determine which apartment was entered by the informer, if in fact he entered an apartment. (R. 49). The informer exited the apartment building two hours after entering, (R. 50), handed the officer a small quantity of marijuana. The officer did not ask the informer questions concerning where and with whom he had been, but simply assumed the contraband came from the Anselmo-Lee apartment.

Three days later (the delay is unexplained) the officer-affiant filed an affidavit, obtained a warrant, and searched the apartment.

The affidavit of the police officer reads as follows:

> "On Wednesday, March 24, 1971, Officer Jerry Faulkner received a telephone call from an unknown white male who told the officer that Phil Anselmo and Terry Lee were selling marijuana, pills and cocaine from 919 Gov. Nichols Street, Apartment 4. This subject stated that he had attended a pot party (marijuana smoking) at the above address in which he saw Phil Anselmo and Terry Lee smoking marijuana and distributing marijuana. This subject refused to give his name.

"On Friday, March 26th, 1971, Officer Faulkner spoke to a reliable and confidential informant who has in the past given Officer Faulkner information which has resulted in the arrests and conviction of numerous narcotic violators. This informant told Officer Faulkner that he had been invited to attend a pot party to be held later that night at 919 Gov. Nichols. He stated that he had been invited by Phil Anselmo. That same night at approximately 8:00 p.m. Officer Faulkner met with this confidential informant and performed a strip search upon the informant for drugs. Officer Faulkner informed the informant to attend the pot party and if possible to procure some of the drugs.

"It should be noted that the informant was kept under surveillance both entering and leaving 919 Gov. Nichols, Apartment 4, by Officer Faulkner.

"At approximately 10:30 p.m. on the same date the informant was observed leaving 919 Gov. Nichols Street, Apartment 4, and immediately met with Officer Faulkner. At this time the informant turned over to Officer Faulkner a small quantity of greenish brown vegetable matter which he stated that he had procured while at the pot party. A field test conducted by Officer Faulkner proved positive for the presence of marijuana.

"It is the affiant's belief that drugs are being sold from 919 Gov. Nichols Street, Apartment 4."

This statement under oath is false in at least three respects, clearly established in the trial court: (1) No one was present in the apartment on the evening of March 26, 1971; (2) Officer Faulkner did not see the informer enter Apartment 4 of 919 Governor Nichols Street; and (3) Officer Faulkner did not observe the informer leave Apartment 4 at that address. Therefore, the informer lied and Officer Faulkner, if he did not intend to lie, falsely stated that he observed the informer enter and leave Apartment 4, when in fact all he observed was the informer entering and leaving a multi-apartment building.

The State of Louisiana contends that this makes no difference. If the neutral magistrate was satisfied with the affidavit, *and it stated a probable cause to search, even if falsely stated,* the warrant may not be attacked in a Motion to Suppress. The Louisiana Supreme Court agrees.

CONSTITUTIONAL ISSUE INVOLVED

In a Fourth Amendment attack upon the validity of a search warrant, may the mover prove the averments in the supporting affidavit to be false.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This important constitutional issue has never been decided by this Court. The decisions of the Louisiana Supreme Court is in conflict with the only pertinent

federal appellate decisions known to us. *King v. United States*, 282 F.2d 398 (4th Cir. 1960); *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968); *United States ex rel. Mayfield v. Pate*, 451 F.2d 1381 (1971).

The opinion of the Louisiana Supreme Court states:

> "The Supreme Court of the United States has not ruled squarely on the question before us. *Rugendorf v. United States* 376 U.S. 528 (1964). However, it is relevant to note that earlier this year the United States Supreme Court denied certiorari in *People v. Healey*, 126 Ill. App. 2d 189, 261 N.E. 2d 468 (1970). See *Healey v. Illinois*, 402 U.S. 905 (1971).
>
> "The decision in *People v. Healey*, supra, was based upon a decision by the Supreme Court of Illinois in *People v. Bak*, 45 Ill. 2d 140, 258 N.E.2d 341 (1970). In the *Bak* case the court held that the issuance of a search warrant represented a conclusive judicial finding of the existence of probable cause and that any subsequent hearing must be limited to an examination of the face of the complaint and warrant."

In so holding, the Louisiana Supreme Court erroneously gives weight to this Court's denial of certiorari in *People v. Healey*, supra. It is fundamental that this Court's denial of certiorari does not signify approval of a lower court decision. Further, the Louisiana Supreme Court overlooks the fact that Illinois, the site

of *Bak* and *Healey*, supra, is within the United States Court of Appeals for the Seventh Circuit. That Circuit, in our opinion, has rejected the concept approved by the Louisiana Supreme Court in the Seventh Circuit's decision in *United States ex rel. Pugh v. Pate*, supra, and interprets the Fourth Amendment to permit an inquiry into the truth of averments contained in the affidavit required in the Amendment.

If the Louisiana Decision is permitted to stand, the law of the state is that a spurious affidavit, the sole basis for the warrant and search, is not subject to attack if it sets out probable cause for the issuance of the warrant. Today, in Louisiana, a police officer who has the technique to write a sufficient probable cause affidavit and the inclination to falsify it, gets his warrant, and is immune from any contradictory inquiry. The notion of the Louisiana Supreme Court that statutes against false swearing will deter false swearing ignores the fact that perjury convictions are not uncommon. Moreover, under the Louisiana decision, the search, even if predicated upon a false affidavit, is reasonable, and the defendant will most assuredly be convicted. Thereafter, the false swearing affiant, if somehow detected at a later stage in the proceedings, is also guilty of a criminal offense. The only irony remaining is that the defendant and the police officer might share the same cell in the state penitentiary.

The principle that Fourth Amendment guarantees are to be liberally construed to prevent impairment of the protection extended, *Grau v. United States*, 1932, 287 U.S. 124, 53 S.Ct. 38, 40, is meaningless, if the guar-

antee may be circumvented by false averments in the required supporting affidavit.

CONCLUSION

For the reasons set forth herein, we request that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

ORAL REASONS OF TRIAL JUDGE

"In this case the Court after hearing the evidence, and reading the trial memoranda submitted by both sides, the Court is of the opinion that the affidavit filed herein was based on false information of the informer. This is not to in any way allude to the integrity of the police officer who was the actual affiant in the case. This Court is very familiar with his honesty and integrity. He just got a bum steer apparently from the informer. I realize that the State is in a position where they can't come back at the evidence produced by the defendant in such a situation because of the fact it would mean disclosing the identity of the informer.

The defense has produced evidence that is uncontradicted and uncontroverted by the State; and consequently, the Court sustains the Motion to Suppress the Evidence in each case."

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 51,664

STATE OF LOUISIANA
versus
PHILIP J. ANSELMO, JR. & TERRANCE C. LEE

IN RE: THE STATE OF LOUISIANA, THROUGH THE DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS, ON APPLICATION FOR WRITS OF CERTIORARI DIRECTED TO THE HONORABLE MATTHEW S. BRANIFF, JUDGE, CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

SUMMERS, Justice.

On the State's application we granted writs under our supervisory jurisdiction to review an order of the Criminal District Court of Orleans Parish sustaining a motion to suppress evidence seized by virtue of a search warrant. The warrant issued by another judge of the same court commanded the search of the premises described as 919 Governor Nicholls Street, Apartment 4, in New Orleans, and authorized the seizure there of narcotics, narcotic paraphernalia, hallucinogenic drugs and guns.

The search warrant was issued on the basis of an affidavit signed by Officer Jerry Faulkner of the New Orleans Police Department. It recited that on Wednesday, March 24, 1971, Faulkner received a telephone call from an unknown white male who told him that defendants were selling marijuana, pills and cocaine from 919 Governor Nicholls Street, Apartment 4. The informant stated that he had attended a "pot party" (marijuana smoking) at that address in which he saw defendants smoking and distributing marijuana. The informer refused to give his name.

Faulkner further affirmed that on Friday, March 26, 1971, he spoke to a reliable and confidential informer who had in the past given information resulting in the arrest and conviction of numerous narcotic violators. This informer told Faulkner that he had been invited by one of the defendants to attend a "pot party" to be held later that night at the 919 Governor Nicholls Street address. According to Faulkner's sworn statement, at approximately 8 o'clock that same night, he met the informer and performed a "strip search" upon him for drugs. Finding none, he instructed the informer to attend the "pot party" and, if possible, to procure some of the drugs. The informer was then kept under surveillance by Faulkner until he entered 919 Governor Nicholls Street, Apt. 4. Later, about 10:30 that evening the informer was observed by Faulkner leaving 919 Governor Nicholls Street, at which time he turned over to Faulkner a small quantity of greenish-brown vegetable matter procured at the "pot party." A field test proved positive for the presence of marijuana.

The application for the search warrant and the affidavit supporting it were presented and the search warrant issued on March 29, 1971. On that same evening at 7:30 Officers Faulkner and James Lewis seized narcotics and narcotic paraphernalia in the apartment, leaving one copy of the search warrant with the defendant Anselmo.

On May 17, 1971, defendants were charged in a bill of information with possession of marijuana, a controlled dangerous substance. La. R.S. 40:971.

The following month defendants filed a motion to suppress. In this motion, they alleged they were the sole residents of apartment #4 at 919 Governor Nicholls Street; that the affidavit which was the basis for the issuance of the search warrant authorizing the search of these premises was based upon information supplied by an informant; that the information was unreliable, fraudulent and intentionally falsified; and, therefore, the search warrant was defective and the evidence seized should be suppressed.

In a memorandum brief filed in support of the motion to suppress, defendants state that the informer referred to in the affidavit in support of the search warrant "did intentionally and fraudulently manufacture a story concerning a 'pot party' he allegedly attended at defendants' apartment on March 26, 1971," and that "defendants can conclusively show that there was no such 'pot party' at their apartment on that date." The brief urged the trial judge to hold an evidentiary hearing on the motion to suppress to permit defendants to establish the falsity of the information given by the

informer. Over the State's objection, defendants were permitted to produce a number of witnesses, all of whom swore that defendants were not at 919 Governor Nicholls Street when the informer allegedly obtained the marijuana on the night of March 26, 1971.

After hearing the evidence the trial judge sustained the motion to suppress, stating his reasons from the bench:

> "In this case the Court after hearing the evidence, and reading the trial memoranda submitted by both sides, the Court is of the opinion that the affidavit filed herein was based on false information of the informer. This is not to in any way allude to the integrity of the police officer who was the actual affiant in the case. This Court is very familiar with his honesty and integrity. He just got a bum steer apparently from the informer. I realize that the State is in a position where they can't come back at the evidence produced by the defendant in such a situation because of the fact it would mean disclosing the identity of the informer.
>
> The defense has produced evidence that is uncontradicted and uncontroverted by the State; and consequently, the Court sustains the Motion to Suppress the Evidence in each case."

To review this ruling, writs were granted.

The issue presented is whether the truthfulness of the facts set out in an affidavit supporting a search

warrant may later be attacked at a hearing on a motion to suppress.

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of this State are almost identical. Both assure the right of the people to be secure in their persons, houses and effects against "unreasonable" searches and seizures. Both prescribe that no search warrant shall issue except "upon probable cause supported by oath or affirmation" particularly describing the place to be searched and the persons or things to be seized.

In *Ker v. California*, 374 U.S. 23 (1963) the United States Supreme Court held that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment," and that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments." See *Aguilar v. State of Texas*, 378 U.S. 108 (1964).

The Supreme Court of the United States has not yet ruled squarely on the question before us. *Rugendorf v. United States*, 376 U.S. 528 (1964). However, it is relevant to note that earlier this year the United States Supreme Court denied certiorari in *People v. Healey*, 126 Ill. App. 2d 189, 261 N.E. 2d 468 (1970). See *Healey v. Illinois*, 402 U.S. 905 (1971).

The decision in *People v. Healey*, supra, was based upon a decision by the Supreme Court of Illinois in *People v. Bak*, 45 Ill. 2d 140, 258 N.E. 2d 341 (1970). In the Bak case the court held that the issuance of a search warrant represented a conclusive judicial

finding of the existence of probable cause and that any subsequent hearing must be limited to an examination of the face of the complaint and warrant. In so holding the court stated:

> The majority of this court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence.

Decisions on the question have not been consistent. A clear majority, however, favor the view expressed in *People v. Bak*, supra.; *Kenney v. United States*, 81 U.S. App. D.C. 259, 157 F 2d 442 (D.C. App. 1946); *United States v Brunnett*, 53 F 2d 219 (8 Cir. 1931); *People v. Healey*, 126 Ill. App. 2d 189, 261 N.E. 2d 468 (1970); *Bowen v. Commonwealth*, 199 Ky. 400, 251 S.W. 625 (1923); *Head v. Commonwealth*, 199 Ky. 222, 250 S.W. 848 (1923); *Burrell v. State*, 207 Md. 278, 113 A. 2d 884 (1955); *Armstrong v. State*, 195 Miss. 300, 15 So. 2d 938 (1943); *Hughes v. State*, 85 Okla. Crim. 37, 185 P. 2d 236 (1947); *Young v. State*, 74 Okla. Crim. 64, 123 P. 2d 294 (1942); *O'Brien v. State*, 205 Tenn. 405, 326 S. W. 2d 759 (1959); *Johnson v. State*, 163 Tex. Crim. 101, 289 S.W. 2d 249 (1956); *Ware v. State of Texas*, 110 Tex. Crim. 90, 7 S.W. 2d 551 (1928); *Contra*,

King v. U.S., 282 F.2d 398 (4 Cir. 1960); *U.S. v. Nagle*, 34 F 2d 952 (N.D. N.Y. 1929); *People v. Alfinito*, 16 N.Y. 2d 181, 264 N.Y. S.2d 243 (1965).

In our considered judgment Louisiana should subscribe to the majority view. In this State "A search warrant may issue upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant." La. Code Crim. P. art. 162.

And by Article 703A of the Code of Criminal Procedure a defendant aggrieved by an *unconstitutional* search and seizure may move to suppress the evidence seized.

Nothing in this procedural law of Louisiana suggests that the action of the judge who issues the search warrant is subject to review by another judge except on the question of the constitutionality of the search and seizure. So far as we can determine from the Constitution, both State and Federal, the requirement is that the warrant issue upon probable cause, "supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Officer Faulkner presented a lengthy and detailed affidavit in support of the application for the search warrant. The affidavit described the place (919 Governor Nicholls Street, Apt. 4) and the things (narcotics, narcotic paraphernalia and guns) to be seized — both with

particularity. There is no doubt, therefore, that the warrant was issued in this case "supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The only question remaining for resolution to satisfy all constitutional requirements for the issuance of the warrant is to decide whether the affidavit supports a finding of probable cause. In our view it clearly does.

Two confidential informants were relied upon; one anonymous and the other known to Officer Faulkner to be reliable having furnished information before resulting in arrests and convictions of numerous narcotic violators. One informer was seen and heard by Officer Faulkner and participated in the investigation which served as a basis for the affidavit. Both informers referred to "pot parties" at the specific address given in the warrant. Both informed that they had been invited to these parties by one or both defendants. Added to this evidence, is the sworn statement of Officer Faulkner depicting the events which he personally observed and experienced: The "strip search" of the informer by which Officer Faulkner was assured that the informer had no narcotics or marijuana on him; his close surveillance of the informer thereafter until he went into the premises at 919 Governor Nicholls Street and later emerged under the scrutiny of Officer Faulkner bearing small quantities of marijuana.

This combination of facts and circumstances, together with the known reputation of Officer Faulkner for integrity and honesty, amply establish that probable cause was shown for the issuance of the search war-

rant. Thus the constitutional requirement was satisfied for the issuance of the warrant and the search and seizure made upon the authority of that warrant is no longer subject to attack.

It is "elementary" as the court observed in *Aguilar v. Texas*, 378 U.S. 108 (1964), that the reviewing court may consider *only* information brought to the magistrate's attention to sustain the State contention that the warrant is valid under constitutional standards. If this is so, it is equally as "elementary" that the reviewing court may only consider information brought to the magistrate's attention in a contention by the defendant that the warrant was not issued according to constitutional requirements.

The rule of law that probable cause is a "practical non-technical conception affording the best compromise that has been found for accommodating these often opposing interests" is the standard established under the Fourth Amendment obligatory on the States through the Fourteenth Amendment. *Bringer v. U.S.*, 338 U.S. 160 (1949).

The constitution requires that probable cause be determined by a "neutral and detached magistrate" and not by "the officer engaged in the often competitive enterprise of ferreting out crime." *Spinelli v. U.S.*, 393 U.S. 410 (1969) and *Johnson v. U.S.*, 333 U.S. 10 (1948). And the Spinelli case makes another pertinent observation in this regard

". . . established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257 (1960).

Another holding we find persuasive here in our consideration of the probable cause issue is the statement in *McCray v. Illinois*, 386 U.S. 300 (1967), quoted from the opinion in *State v. Burnett*, 42 N.J. 377, 201 A. 2d 39 (1964):

> The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the

affiant, he may require that the informant be identified or even produced.

These expressions concerning probable cause under Fourth Amendment standards convince us that the constitutional requirement of probable cause was satisfied at the time the warrant was issued. The fact that defendants have been able to assemble witnesses to swear almost four months later that defendants were not in their apartment when the informer said that they were, and when the police officer was assured that marijuana was obtained at that address, does not affect the validity of the warrant.

Salutary general principles support this decision. The constitutional requirement for the showing of "probable cause" is to be supported by an affidavit and the independent judgment of a magistrate. This assures to a great extent the truth of the showing that must be made. The penalty for false swearing and the integrity and impartiality of the magistrate were assurances enough in the judgment of the framers of the constitution to give the citizen the protection needed against "unreasonable" searches and seizures. The constitution guarantees no more.

It is material that this criminal proceeding for the issuance of a search warrant end at some point. And so the constitution stopped it with these assurances. No full-blown trial and appeal on every aspect of the issuance of the warrant is assured by the constitution, only the guarantees mentioned may be relied upon.

Important, too, is the need to protect the informer. If the issuance of search warrants based upon information supplied by informers is to continue, the State must not be compelled to disclose the name of its informer in later proceedings testing the truthfulness of the information furnished. The informer system is a vital part of the law enforcement process without which it would be especially difficult to control drug traffic.

Wigmore stated the reasons:

> A genuine privilege, . . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity — to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and

discourages others from entering into a like relationship.

That the government has this privilege is well established, and its soundness cannot be questioned. (8 Wigmore, Evidence §2374 (f) (McNaughton rev. 1961)).

Another factor which militates against this inquiry into the truthfulness of the affidavit upon which the issuing magistrate based on the search warrant is the questionable practice of judges reviewing judgment of judges on the same court on new and entirely different evidence not available to the judge or magistrate issuing the warrant. *People v. Bak*, 45 Ill. 2d 140, 258 N.E. 2d 341 (1970); *O'Brien v. State*, 205 Tenn. 405, 326 S.W. 2d 759 (1959).

For the reasons assigned, the judgment of the trial court suppressing the evidence is reversed and set aside; and the motion to suppress is denied.

Concurring Opinion

TATE, Justice.

The writer concurs in the result reached.

The trial court found that the police officer making the affidavit was truthful, even though the information received by him from the informer was false. Under these circumstances, I think the search warrant should be upheld, as based upon the truthful affidavit

of a law officer, which showed probable cause for the search.

The majority's opinion, however, seems to imply that the truthfulness or good faith of the police officer making the affidavit is immaterial, if indeed the words of the affidavit (whether truthful or not) show probable cause. Thus, even though under our constitution there may be no probable cause for the search of a home, by perjury a police officer may secure a warrant for such search. The truthful police officer, who is unwilling to lie, cannot get a search warrant; the liar can.[1]

The guarantees of our constitution for the sanctity of the home and person from search cannot be circumvented by perjury, so as to be beyond review by the courts. I cannot believe that the often-perfunctory authorization of a search warrant, upon presentation of an affidavit showing probable cause, is to be equated with an unreviewable judicial determination such as one founded upon close examination and testing of veracity.

The suggestions of the majority opinion to the contrary are dicta. I concur, but with extreme reservation as to the wisdom of incorporating so much dicta as to matters not at issue.

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[1]It is unnecessary to emphasize that in the present instance there is no question but that Officer Faulkner swore to what he believed to be the truth.

BARHAM, Justice, Concurring in the Decree Only.

The opinion is far broader than the narrow question presented for our determination. I take issue with the dictum that when a judge makes an *ex parte* determination that an affiant is truthful in *character*, there can be no later *contradictory* determination of whether the affiant was truthful in *fact*. A knowingly false affidavit cannot support a search warrant. To hold otherwise would invite police officers not to seek actual probable cause to support a warrant, but rather to deliberately state a falsehood which reflects fabricated probable cause. Probable cause is a state of mind. If there is no probable cause in the mind of the affiant in fact, there can be no basis for legal probable cause upon which a warrant can stand. The factual basis of an affidavit may be false, but there must have been a belief in the affiant's mind of its verity. Most of the cases relied upon have dealt with false information and not false swearing. I therefore concur in the decree only.